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THE CONSTITUTIONAL RIGHT OF THE INDIGENT FACING INVOLUNTARY CIVIL COMMITMENT TO AN INDEPENDENT PSYCHIATRIC EXAMINATION[1]

by

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Though the liberty interests of the person facing involuntary civil commitment can be construed to be very similar to those of the criminal defendant, the legal protections afforded these two have experienced very distinct and separate growth. The numerous constitutional rights established over the past 25 years in the criminal area in recognition of the massive deprivation of liberty suffered by convicted criminals[2] have by and large not translated to those persons facing loss of liberty under the *civil* law permitting involuntary commitment.[3] Despite the similar liberty interests at stake for both criminal defendants and persons faced with involuntary civil commitment,[4] the Supreme Court has specifically differentiated the due process required in the two contexts, providing a less stringent standard in the civil realm for involuntary com-

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[1]As used in this article, an independent psychiatric examination will mean a psychiatric examination by a doctor previously unconnected to the commitment hearing and with no direct interest in the outcome of the commitment hearing or the treatment of the respondent involved in that hearing. This does not translate to a right for any respondent to choose his or her psychiatric expert at the State's expense. *See* Miller & Fiddleman, *The Adversary System in Civil Commitment of the Mentally Ill; Does It Exist and Does It Work?*, 8 J. PSYCH. & L. 403 (1981).

[2]*See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (appointment of counsel is a fundamental right, necessary to fair trial); Escobedo v. Illinois, 378 U.S. 478 (1964) (established right to counsel at pretrial stage when inquiry of state has begun to focus on particular suspect); Douglas v. California, 372 U.S. 353 (1963) (right to counsel post-conviction on first appeal); Argersinger v. Hamlin, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases when prison term imposed); Pointec v. Texas, 380 U.S. 400 (1965) (right to confront witnesses against accused); Miranda v. Arizona, 384 U.S. 436 (1966) (pre-trial statements of defendant are subject to fifth amendment privilege against self-incrimination). For the right with which this article is concerned, see Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (established the right of indigent criminally accused to appointment of an independent psychiatrist when defendant's sanity is in issue).

[3]Despite also facing what has been termed "a massive curtailment of liberty" by many lower federal courts in describing involuntary civil commitment, *see, e.g.*, Bell v. Wayne County General Hospital 384 F. Supp. 1085 (1974); Brown v. Jensen, 572 F. Supp. 193 (D. Md. 1983); Fubanks v. Clarke, 434 F. Supp. 1022, 1028 (D.C. Pa. 1977), the area of civil commitment is subject to less stringent procedural protections than is a criminal defendant. Professor Wexler has emphasized the inequity of this state of affairs: "[A]merican law has traditionally had two parallel but very different procedural systems for controlling aberrant behavior — a criminal system with a host of procedural rights and a therapeutic system with a rather few." D. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES. 23 (1981).

[4]One federal district court stated:

> It matters not whether the proceedings be labeled 'civil' or 'criminal' or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for crime, rehabilitation as a juvenile for delinquency, or treatment and training, as a feebleminded or mental incompetent — which commands observance of the constitutional safeguards of due process.

Lessard v. Schmidt, 349 F. Supp. 1078, 1097-98 (E.D. Wis. 1972) *citing* Hervford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968). Another federal court, in an interesting, if not reverse view of the problem, actually reasoned that certain criminal defendants were entitled to certain protections because those protections were even provided respondents in civil commitment hearings. Kanteles v. Wheelock, 439 F. Supp. 505, 510 (D.C.N.H. 1977).

mitment based upon the alleged purposes of civil commitment law.[5] The "benevolent" intent of the state, in the civil context, is the most frequently cited basis for the difference found in civil and criminal procedural rights.[6]

The recently established constitutional right to an independent psychiatric examination for a criminal defendant, when the defendant's sanity is at issue,[7] has not been extended to the involuntary civil commitment process.[8] However, for the following reasons, the right should be so extended.

First, the interpretation of due process in the involuntary commitment procedure, as construed by lower federal courts and state courts to require an exam, shows greater uniformity and logical cohesiveness than that defined by applicable Supreme Court decisions. Second, the area of juvenile adjudication presents great similarity of purpose to civil commitment, yet the due process protections deemed necessary in juvenile proceedings are greater than those afforded those subject to involuntary civil commitment. Third, it is here argued that the deprivation of liberty occasioned by involuntary civil commitment is on a par with, and many times greater than, the deprivation caused by criminal incarceration. Finally, by the Supreme Court's own reasoning in *Ake v. Oklahoma,* the examination by a neutral psychiatrist of a person subject to involuntary commitment is a necessary element of both due process and the right to an effective defense, and should thereby become a constitutionally guarded right.

CIVIL COMMITMENT IN THE UNITED STATES

The past 150 years have been the back-drop for dramatic changes in the care and treatment of the mentally ill.[9] From the origins of almshouses representing purely custodial care in the early 1800's,[10] to an early twentieth century shift to hospitalization with psychotherapeutic intervention,[11] the

[5]For the latest statement on these important differences in the civil commitment and criminal justice systems, see the Supreme Court reasoning in Addington v. Texas, 441 U.S. 418 (1979). The Court in that case held that the standard of proof requiring proof "beyond a reasonable doubt" has historically been reserved for criminal cases and has not been extended casually. *Id.* at 428. Further, the Court found crucial that in civil commitment, state power is not used in a punitive sense. *Id.*

[6]*See, e.g.,* Coll v. Hyland, 411 F. Supp. 905, 912 (D.C.N.J. 1976) (because of benevolent purposes, procedural safeguards in criminal proceedings are not necessarily applicable in civil commitment); Hickey v. Morris, 722 F.2d 543 (1983) (different procedures for civil commitment and criminal proceedings based on different objectives); *see also* Comment, *Youngberg v. Romeo,* 102 S. Ct. 2452 (1982), 21 DUQ. L. REV. 1037 (1982) (fundamental liberties are overridden in civil commitment context only because of the superceding, non-punitive interest of state).

[7]*Ake,* 105 S. Ct. 1087.

[8]This right has not been extended to civil commitment as a constitutional one. However, such a right has been recognized statutorily in some state systems.

[9]*See, e.g.,* Gosling & Ray, *Historical Perspectives on the Treatment of Mental Illness in the United States,* 10 J. PSYCH & L. 135 (1982).

[10]*Id.*

[11]*See, e.g.,* S. SEGAL & U. AVIRAM, THE MENTALLY ILL IN COMMUNITY – BASED SHELTER CARE: A STUDY OF COMMUNITY CARE AND SOCIAL INTEGRATION 18 (1978). The height of the hospitalization treatment was in

system now emphasizes de-institutionalization, with outpatient psychotropic treatment.[12] The present tensions and debates take place between the medical and legal professions.

The legal profession in the 1960's and early 1970's began to challenge the then-existing state commitment processes. Though statutory, the commitment process prior to the 1970's was almost wholly clinical, rather than judicial.[13] The typical involuntary commitment formerly afforded a respondent very little protection of his civil and constitutional liberties.[14] Under the parens patriae power of the state, judge, psychiatrist and attorney in a civil commitment proceeding worked "cooperatively" to decide what was best for the respondent, regardless of the respondent's wishes.[14]

The criteria for civil commitment have gradually become stricter. While the emphasis was once almost exclusively on treatment based upon the state's parens patriae powers,[15] that emphasis is shifting to a standard of commitability based upon danger to oneself or others.[16] This "dangerous" standard is based upon the police power to proscribe individual behavior to protect the public health, safety, and welfare.[17] This shift toward a "dangerousness" standard is consistent with a more rigorous protective stance regarding respondents' rights, for a dangerousness standard is more difficult to satisfy than one relying upon the "in need of treatment" rationale under parens patriae.[18]

1955 in the U.S. when the patient population reached its zenith of 559,000 patients. Goldman, Adams, & Taube, *De-institutionalization: The Data Demythologized*, 34 HOSP. & COM. PSYCH. 129, 131 (1983).

[12]*See generally* Gosling & Ray, *supra* note 9; S. SEGAL & U. AVIRAM, supra note 11.

[13]*See, e.g.*, Miller & Fiddleman, *supra* note 1 at 405; Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways,"* 51 JUDICATURE 370, 377 (1968); Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C.L. REV. 1027, 1029 (1982); Fitch, *Involuntary Commitment of the Mentally Disabled: Implementation of the Law in Winston-Salem, North Carolina*, 14 N.C. CENT. L.J. 406, 408 (1984).

[14]*See* Miller & Fiddleman, *supra* note 1 at 408. In his article, Professor Hiday went so far as to state that psychiatrists had attained such a position of power that they became the equivalent of a "prosecutor" at commitment hearings with the ability to drop, reduce, or advance charges of mental illness or simply recommend release. *See* Hiday, *supra* note 13, at 1042.

[15]Parens Patriae literally means "parent of the country." The power is a historical one and imposes a duty upon the state to act in what it considers to be the "best interests" of those who because of infirmity or age, are perceived as unable to act in their own best interests. *See, e.g.*, Colyar v. Third Judicial Dist. Court, 469 F. Supp. 424, 430 (D.C. Utah 1979) (court held that under parens patriae power the state can commit a person even though he poses no threat to society).

[16]*See* Miller & Fiddleman, *supra* note 1 at 408. The trend, as indicated by federal and state court decisions, is to require more than simply parens patriae authority in order to justify commitment. *See, e.g.*, Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *reinstated and enforced*, 379 F. Supp. 1376 (E.D. Wis 1974), *vacated on other grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); *In re* Levias, 83 Wash. 2d 253, 517 P.2d 588 (1973); Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (1973); Hawks v. Lazara, 157 W. Va. 417, 202 S.E.2d 109 (1974); Stamus v. Leonhard, 414 F. Supp. 439 (S.D. Iowa 1976); Bell v. Wayne County Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974); Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975); Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976); Powell v. State of Florida, 579 F.2d 324 (C.A. Fla. 1978).

[17]*See*, Note, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1222 (1974). The constitutional foundations of the state police power are analyzed in Jacobson v. Massachusetts, 197 U.S. 11, 24-5 (1905).

[18]*See, e.g.*, Bellham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), *aff'd in part, vacated in part*, 678 F.2d

Although a great number of procedural rights are now provided those facing involuntary civil commitment,[19] this article is concerned with those that relate to the current interpretation of due process for the mentally ill. If certain basic rights are not *effectively* enforced, such as the right to counsel,[20] the right to a commitment standard protective of a respondent's liberty,[21] and the right to placement in the least restrictive setting,[22] then those other rights recognized in the civil commitment context stand to become meaningless.[23]

Beyond the right to counsel, established in most state statutes or state and

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511 (5th Cir. 1982), *vacated sub. nom.* Ledbetter v. Benham, 103 S. Ct. 3565 (1983), *on remand* 719 F.2d 771 (5th Cir. 1983) (mental illness by itself, is not enough for involuntary commitment; standard must be dangerous *and* mentally ill); Project Release v. Prevost, 722 F.2d 960 (5th Cir. 1983) (mental illness alone can't justify involuntary civil commitment must be both dangerousness and mental illness); Dixon v. Attorney General, 325 F. Supp. 966 (D.C. Pa. 1971) (statute permitting involuntary commitment based solely on mental illness violates due process); *Colyer*, 469 F. Supp. 424 (statute allowing involuntary commitment without a threat of harm to themselves or another is overly broad); Lake v. Cameron, 364 F.2d 657, (D.C. Cir. 1966), *cert denied* 382 U.S. 863 (1966) (deprivations of liberty based upon solely danger to oneself should not go beyond that absolutely necessary for one's protection); Bell, 384 F. Supp. 1085 (1974) (statute was fatally overbroad when allowing involuntary commitment if person is mentally ill without a requirement of realistic danger to oneself).

[19]For a good overview of a number of the rights now firmly established in mental health jurisprudence, see generally Doremus v. Farrell, 407 F. Supp. 509 (D.C. Neb. 1975) (sets forth many procedural rights of respondents in civil commitment hearings, most notably right to counsel, to confront and cross-examine witnesses, to be present at the hearing, and to exclude evidence under standard exclusionary policies).

[20]As of 1971, 42 states had provided for the right to be represented by counsel at a civil commitment hearing. At that time, 24 of those states provided for counsel for those unable to afford such representation. S. BRAKEL & R. ROCK, MENTALLY DISABLED AND THE LAW 54 (1971).

Similarly, numerous federal courts and states have recognized a right to be represented by an attorney at an involuntary commitment proceeding. *See, e.g.*, Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Lessard v. Schmidt, 349 F. Supp. 1978 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *reinstated and enforced*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Bell*, 384 F. Supp. 1985; Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974); Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (1973); State v. Collman, 9 Or. App. 476, 497 P.2d 1233 (1972); Dixon v. Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971); *In re* Barnard, 455 F.2d 1370 (D.C. Cir. 1971); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Woodall v. Bigelow, 20 N.Y.2d 852, 231 N.E.2d 777, (1967); Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636 (1966).

[21]*See supra* note 18. *See also* Beis, *State Involuntary Commitment Statutes*, 7 MENT. DIS. L. REP. 358 (1983). *But see* Applebaum, *Is the Need for Treatment Constitutionally Acceptable as a Basis for Civil Commitment?*, Law, Medicine, and Health Care 144 (1984).

[22]This area of the law remains somewhat clouded. Though early federal court decisions and relatively recent state statutory law were moving in the direction of mandatory consideration of the least restrictive alternative for a person involuntarily committed, it is now unclear since the U.S. Supreme Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982) what remains of the force behind the previous mandate for the least restrictive placement. While two previous decisions of the U.S. Supreme Court could be read to support a constitutional right to the least restrictive placement, O'Connor v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972), the Court in *Youngberg* seemed to limit such judicial intervention into the commitment process and instead deferred to the professional judgment of the hospital staff involved. Interestingly however, the Court's holding has lead to different interpretations of the present viability of the least restrictive placement doctrine. *See, e.g.*, Association for Retarded Citizens v. Olson, 561 F. Supp. 473 (D.N.D. 1982) (read *Youngberg* to limit entitlement to least restrictive alternative); *but see* Scott v. Plante, 691 F.2d 634 (3d Cir. 1982) (interpreted *Youngberg* to support least restrictive alternative — right because respondent's counsel in that case had stipulated that Romeo would never be able to leave the institution). An interesting twist to this debate is the fact that since *Youngberg* was decided, Nicholas Romeo has been placed in a community residence. *See* Cook, *The Substantive Due Process Rights of Mentally Disabled Clients*, 7 MENT. DIS. L. REP. 346, n.74 (1983).

[23]*See supra* notes 5, 19.

federal case law,[24] courts have set boundaries on other steps in the commitment procedure. In *Wyatt v. Stickney*,[25] an Alabama federal district court set forth minimum constitutional standards for care in mental institutions and held that persons have a constitutional right to treatment in the least restrictive setting and ordered the state to develop reasonable alternatives to institutionalization.[26] This stance, though perhaps not in as extreme a form, was adopted by a number of lower federal courts[27] and some states.[28]

In *O'Connor v. Donaldson*[29] a challenge was brought to the basis of a state statute providing for involuntary commitment.[30] Kenneth Donaldson was committed under a statute authorizing commitment for indefinite custodial confinement for mental illness.[31] Commitment was to be for care, maintenance, and treatment.[32] Mr. Donaldson was confined approximately 15 years and had repeatedly requested release to friends who were willing to ensure his safety.[33] Evidence at trial indicated that Donaldson had never posed a danger to himself nor to others while confined.[34] This matter was the first mental health case to reach the Supreme Court. The Supreme Court set forth a constitutional right to liberty in that context by holding that a state cannot constitutionally confine a non-dangerous person who is capable of surviving safely in freedom by himself or with the help of willing and responsible friends or family members.[35] Even though Florida's applicable statute in *O'Connor*

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[24] *See supra* note 20.

[25] 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 334 F. Supp. 1341 (M.D. Ala 1971), *orders entered*, 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, reversed and remanded in part sub. nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). This case is actually a group of federal district court decisions setting forth these rights.

[26] The first case to mandate consideration of the least restrictive alternative was Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) but the court there required only good faith effort of the state in examining available community resources. In *Wyatt*, the court mandated development of such resources. The court in Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975) also ordered creation of community facilities, but that step was based upon statutory authority, not recognition of a constitutional right.

[27] A number of lower federal courts moved to support the constitutional right to treatment in the least restrictive placement for the mentally ill. *See, e.g.*, Phillip v. Carey, 517 F. Supp. 513 (N.D.N.Y. 1981); Eubanks v. Clark, 434 F. Supp. 1022 (E.D. Pa. 1977); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976); Welsh v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). *But see* Garrity v. Gallen, 522 F. Supp. 171 (D. N.H. 1981). *But cf.* New York State Ass'n v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (Court held there was no duty of state to absolutely provide for all treatment needs of mental patients).

[28] Some states have acted to protect this right by statute. *See, e.g.*, N.C. GEN. STAT. §§ 1226-3, 252, 233, 263, 264, 266, 271, 273, 274, 283, 284, 285, 287, 290 (1985 Cum. Supp.) (authorizes commitment to outpatient treatment). OHIO REV. CODE ANN. § 5122.15(E) (state must show consideration of least restrictive alternatives).

[29] 422 U.S. 563 (1975).

[30] *Id.* at 565-67.

[31] *Id.* at 566, n.2.

[32] *Id.*

[33] *Id.* at 568.

[34] *Id.*

[35] *Id.* at 576.

was found unconstitutional, the Court left open the question of what civil commitment standards would satisfy due process requirements. States therefore retained a great deal of flexibility in setting standards for civil commitment. The most widely-adopted post-*O'Connor* standard provides for involuntary commitment "if a person constitutes a danger to himself or others or is unable to provide for his basic personal needs."[36] Nearly half of the states, in apparent recognition of the tremendous deprivation of liberty faced by a respondent subject to civil commitment, have adopted even more stringent standards than constitutionally required.[37]

BASES OF EXTENSION OF THE RIGHT TO AN INDEPENDENT PSYCHIATRIC EXAM

Due Process in Civil Commitment vs. Criminal Prosecution

There is no due process right to appointment of an independent psychiatric expert for the subject of an involuntary civil commitment proceeding though there is for his criminal counterpart.[38] Procedural protections in the civil commitment and criminal areas, systems both for the same purpose of controlling aberrant behavior, have developed separately and resulted in a dearth of protections for subjects facing civil commitment.[39] The very fact of this historical difference, without an examination of the reasons underlying such difference, was relied upon in part by the Supreme Court in *Addington v. Texas* allowing for a lesser standard of proof in involuntary civil commitment than criminal prosecutions.[40]

The stringent safeguards that have developed in the criminal justice system were based upon rigorous preservation of our most sacred right — personal liberty.[41] Judge Learned Hand was careful to emphasize that our system

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[36]Note, *A New Approach to Civil Commitment of the Mentally Ill*, 27 J. OF URBAN AND CONTEM. L. 437, 444-45 (1984). *See also*, Beis, *State Involuntary Commitment Statutes*, 7 MENTAL DIS. L. REP. 358-59 (1983) (author states that the phrase "dangerousness to self" or a facsimile thereof, referring to inability to care for one's basic needs or suicidal tendencies, is to be found in all civil commitment statutes); *supra* note 16.

[37]At least 22 states, as of 1983, required a recent overt threat or act before committing a person on grounds of dangerousness to others. *See* Beis, *supra* note 36.

[38]*Ake*, 105 S.Ct. 1087.

[39]*See*, Wexler *supra* note 3.

[40]441 U.S. 418, 428 (1979).

[41]In the criminal area, the Supreme Court initially moved to incorporate certain of the protections of the Bill of Rights for criminal defendants under a nebulous "fundamental fairness" standard. For an analysis of the reasoning process employed by the Court prior to the 1960's and the current nearly wholesale application of the freedoms under the first eight amendments to the Constitution, see e.g., Betts v. Brady, 316 U.S. 455 (1952); Palko v. Connecticut, 302 U.S. 310 (1937).

Such mental gymnastics required in a "fundamental fairness" approach evolved into a process of "selective incorporation," i.e., under the due process of the fourteenth amendment pertaining to the states, most of the guarantees of the Bill of Rights were made applicable directly to the states. In the area of criminal justice, nearly all of the guarantees of the Bill of Rights have become applicable to the individual states through the due process clause of the 14th amendment. The only rights recognized in the federal criminal justice system, not specifically enforceable as against the states are the fifth amendment right to indictment by a grand jury for capital and infamous crimes, Hurtado v. California, 110 U.S. 516 (1884), and the eighth amendment prohibition against excessive bail [which has never been determined by the U.S. Supreme Court].

of criminal justice "has been always haunted by the ghost of the innocent man convicted."[42] Given that a clear deprivation of liberty by definition occurs in the involuntary commitment of a person, there is little to distinguish the civil and criminal realms in this respect.

Despite arguments put forward emphasizing the comparability of the two processes and the need for a uniform due process interpretation, the law, as interpreted by the Supreme Court in *Addington v. Texas* is that though a "preponderance of the evidence" standard is constitutionally inadequate for involuntary commitment, a "clear and convincing" test is constitutionally sufficient.[43] The corresponding standard for criminal proceedings is a requirement of proof beyond a reasonable doubt.[44] The Supreme Court has termed its reasons for this lesser standard of proof for involuntary commitment "significant."[45] The Court reasoned that "a civil commitment hearing can in no sense be equated to a criminal prosecution"[46] relying upon the belief that "in a civil commitment, state power is not exercised in a primitive sense."[47] The Court went on to explain that a burden of proof "beyond a reasonable doubt" is intended to protect the innocent, and any errors ought to be in favor of allowing some guilty persons to go free. Unlike a criminal prosecution however:

> "the full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction. However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."[48]

Due process in involuntary civil commitment, which the Court admits involves a similar deprivation of liberty to that in the criminal sphere, supposedly merits less protection because family and friends are available to correct any possible errors. Certainly the psychiatrists who testified as to respondent's commitability, or who are part of the same staff that did, are not to be the ultimate guardians of the respondent's due process rights. This due process threshold of "clear and convincing" proof is not justifiable where it is provided by laypersons and those psychiatrists initially responsible for respondent's detention.

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[42]United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

[43]441 U.S. 418, 432-33 (1979).

[44]This standard is now a matter of constitutional due process for criminal defendants. The due process clause of the fourteenth amendment of the US Constitution has been established by the Supreme Court to require proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the accused is charged. Taylor v. Kentucky, 436 U.S. 478 (1978).

[45]441 U.S. 418, 428 (1979).

[46]*Id.*

[47]*Id.*

[48]*Id.* at 428-29.

The Court itself contradicts this rationale for a reduced standard of proof in *Addington*. First, the Court posits psychiatrists as potential allies of the respondent in vindicating possible erroneous commitments. Later in the opinion however, such reasoning is retracted when the Court concludes that the reasonable doubt standard is not applicable to civil commitment because "given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."[49]

It seems just as likely that a reduced standard of proof is necessary to protect the fallibility of psychiatrists and the inability of the state to truly justify the deprivation of liberty occasioned by commitment. In light of the fact that the Supreme Court has refused to recognize a right to treatment, the Court's concern with avoiding unreasonable barriers to treatment for those involuntarily committed seems misplaced.[50] It seems more reasonable to ensure a right to treatment by acknowledging and buttressing it directly than by reducing "obstacles" to its availability, here the obstacle being the due process protection that should be provided a person facing confinement owing to possible mental illness.

It is significant that a litany of decisions by lower federal courts hold that involuntary civil commitment triggers the due process protections of the fourteenth amendment, clearly to protect individual liberty interests.[51] Personal liberty is the same interest implicated in criminal prosecutions. However, after "agreeing" with the lower courts by stating in *Addington* that "[t]his Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,"[52] the Court finds this due process in protection of personal liberty is somehow not as strict a standard. The Supreme Court forbade this type of subjectivity and variability when interpreting the Constitution in *San Antonio Independent School*

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[49] *Id.* at 432.

[50] The first opportunity for the U.S. Supreme Court to establish a constitutional right to treatment was in reviewing the court of appeals' decision in O'Connor v. Donaldson, 422 U.S. 563 (1975). The court of appeals held that such a right existed. *Id.* at 573. The Supreme Court rejected such a holding as being unnecessary to resolution of the case. *Id.*

In Youngberg v. Romeo, 457 U.S. 307 (1982) the court specifically rejected any constitutional right to treatment for those mentally ill subject to commitment. *Id.*

[51] *See, e.g., Colyer,* 469 F. Supp. 424 (an individual's diminished capacity should not affect the protection afforded him when the state attempts to commit him); Tyars v. Finnec, 709 F.2d 1274 (9th Cir. 1983) (involuntary civil commitment is a deprivation of liberty requiring due process in its substantive standard for commitment); Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981) (involuntary civil commitment requires constitutional protection against an unjust deprivation of liberty); Reese v. Nelson, 598 F.2d 822 (3rd Cir. 1979), *cert. denied* 444 U.S. 970 (1979) (procedures leading to the determination of facts justifying confinement are subject to the constitutional limitations of due process); *Bell,* 384 F. Supp. 1085 (14th amendment due process rights apply to involuntary civil commitment because it involves a massive curtailment of liberty); U.S. v. Mattson, 600 F.2d 1295 (1979) (protection of the constitutional rights of the mentally ill has become a national concern).

[52] *Addington,* 441 U.S. 418, 425.

District v. Rodriquez.[53] A lower court cited *Rodriguez* for the proposition that "[w]hether an interest is fundamental depends not on the depth of individual appreciation of the interest (here an interest in preserving personal liberty) at stake, but on whether or not the right is protected by the Constitution."[54]

Justice Sobeloff of the U.S. 4th Circuit Court of Appeals put it somewhat differently. In his concurrence in *Tippett v. Maryland*[55] he conjectured that "[i]n cases involving individual rights, whether civil or criminal, the standard of proof [at a minimum] reflects the value society places on individual liberty."[56] Judge Sobeloff's words reflect an indivisible concept of individual liberty for civil commitment and criminal justice. The Supreme Court in *Addington* asks us to believe the meaning of individual liberty varies, dependent upon which courtroom one is in, civil or criminal.

Comparability of the Juvenile and Civil Commitment Processes

The key element to the establishment of a lesser standard of proof for civil commitment than for criminal procedure in *Addington v. Texas*[57] was the different purposes of the two processes. The Court in *Addington* emphasized that "in a civil commitment, state power is not exercised in a punitive sense."[58] However, even though juvenile proceedings are expressly non-punitive'[59] the Supreme Court did perceive the necessity for a standard requiring "proof beyond a reasonable doubt" in that context.[60] Whereas the Court in *Addington* held that such a standard has been traditionally reserved for criminal cases and is not to be "casually extended" to other matters,[61] it was still so extended to juvenile adjudication.[62]

The Supreme Court, in an apparent effort to obviate any resort to analo-

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[53]411 U.S. 1, 30-31 (1973).

[54]*Colyer*, 469 F.Supp., at 430.

[55]436 F.2d 1153 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom.*, Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

[56]*Id.* at 1166.

[57]*Addington*, 441 U.S. 418.

[58]*Id.* at 428.

[59]*See, e.g.* Parham v. J.R., 442 U.S. 584 (1979); McKeivec v. Pennsylvania, 403 U.S. 528 (1971).

[60]The mandate that a juvenile must be shown to be statutorily delinquent under a burden requiring proof equal to that necessary to convict an adult, was first established in the case of *In re* Winship, 397 U.S. 358, 365 (1970).

[61]*Addington*, 441 U.S. at 428. One author emphasizes the fact that juveniles proceedings everywhere are regarded as civil in nature, not criminal as the Court in *Addington* would have one believe. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 438, n.67 (1966).

[62]*Winship*, 397 U.S. at 365. Note that although the Court here reasons that the "beyond a reasonable doubt" standard has traditionally been reserved for criminal cases and that it should not be applied too broadly or casually to noncriminal cases, *Addington*, 441 U.S. at 428, at the time that the standard was initially mandated for juvenile matters in 1970, the standard had not been applied outside the context of prosecution of adult criminals and that a juvenile proceeding at that time was still primarily civil in nature. D. BRIELAND & J. LEMMON, SOCIAL WORK AND THE LAW, 125-29 (1977).

gizing civil commitment to juvenile hearings, went on in *Addington* to state that unlike the juvenile proceeding in its decision in *In re Winship,*[63] a civil commitment "can in no sense be equated to a criminal prosecution."[64] The basis for that conclusion was not any substantive difference in the loss of liberty, but in whether the individual had committed a criminal act.[65] The Court reasoned that criminal proceedings involving adults and those hearings involving juvenile delinquents are indistinguishable as to the requirement of proof of the commission of a criminal act. The requirement of a criminal act would seem to provide greater assurance that either delinquency status or the condition of commitability exists.[66] Such a requirement in juvenile matters would seem to reduce the need for proof beyond a reasonable doubt, not to intensify it.

The holding of the U.S. Supreme Court in *Ingraham v. Wright*[67] appears to contradict the notion that civil commitment can in no sense be equated with the quasi-criminal status of a juvenile hearing. The deprivation of liberty and conditions of confinement experienced by juveniles and the involuntarily civilly committed, were found in *Ingraham* to be close enough to those of criminal process and detention to warrant the constitutional protection of the Eighth Amendment.[68] Consider also that both processes are intended to be non-adversary, non-criminal, focus on treatment not punishment, and principally adjudicate *status.*

The Supreme Court relies upon *In re Winship*[69] in a very selective fashion, to support its findings in *Addington.* In setting down the mandate of proof beyond a reasonable doubt in *Winship,* the Court found that the courts must exercise "extreme caution in fact finding because of the possibility that [the in-

[63] *Winship,* 397 U.S. 358.

[64] *Addington,* 441 U.S. at 428.

[65] The Court in *Addington,* while historically emphasizing the distinctions between criminal proceedings involving adults and those involving juveniles pointed out the fact that *Winship* recognized that the basic issue of whether the individual in fact committed a criminal act was the same in both proceedings. *Addington,* 441 U.S. at 428. On such a basis, the Court held a (beyond a reasonable doubt) standard equally applicable to juvenile proceedings. However, the Court does not address the essential difference which is how the state's power is brought to bear on the individual, i.e., whether it is in a punitive sense, as in adult criminal proceedings, or in a benevolent intent, as in juvenile or civil commitment hearings.

[66] There is no constitutional requirement in the cases setting forth the appropriate principles for involuntary civil commitment, under the police power of the state, that there be proof of an overt act. Such a standard is considered more difficult to meet. Nevertheless, in seeming recognition of the massive deprivation of liberty involved in commitment of an unwilling respondent, 22 states have passed legislation requiring proof of an overt act or threat in order to commit a person on the grounds that he or she is a danger to others. Beis, *State Involuntary Commitment Statutes,* 7 MENT. DIS. L. REP. 358 (1983).

[67] 430 U.S. 651 (1977).

[68] *Id.* at 669 n.37. A number of federal courts have also asserted that distinct similarities exist between civil and juvenile detention. *See, e.g.,* Santana v. Collazo, 714 F.2d 1172, 1180 (1983) (the confinement of juvenile delinquents or the mentally ill, because not for the purpose of punishment, is subject to more exacting scrutiny than criminal confinement); *Bell,* 384 F. Supp. 1085, 1092 (the fundamental right to liberty at stake in civil commitment is no less than that assured in juvenile or criminal matters). *But see* Parham v. J.R., 442 U.S. 584 (1979).

[69] 397 U.S. 358.

dividual] may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[70] This finding applies with equal or greater force to involuntary civil commitment. The deprivation and the stigmatization of the mentally ill, especially those experiencing hospitalization, is profound.[71]

An examination of the principal criterion for distinguishing criminal prosecution from involuntary civil commitment, that of the alleged benevolent purposes of commitment, reveals a faulty foundation. The U.S. Supreme Court in *In re Gault*[72] and *In re Winship*[73] pointed out that benevolent intent does not serve to eliminate the need for due process safeguards. "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for [a] proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty . . .[74] Without specific reference to juvenile proceedings, the Court in *Gault* posited the idea that an individual whose freedom is at risk requires the effective assistance of counsel to ensure due process standards are met and that skilled, professional inquiry is part of the preparation and submission of the person's defense.[75]

The processes then, civil commitment and delinquency adjudication, seem remarkably similar in their essential elements. The involuntary deprivation of liberty is clear for both institutionalized juveniles and mentally ill. Neither aims to punish and, in fact, under optimal conditions, the goal is to treat the subject of the institutionalization and restore that person to functioning in a more appropriate, acceptable manner. The U.S. Supreme Court has dismissed the notion of "civil labels and good intentions" as determinative of the standard of proof under the due process clause.[76] A serious loss of liberty and resultant stigmatization were at the heart of the Court's concern with any threshold of proof less than "beyond a reasonable doubt" in juvenile adjudication.[77]

Loss of Liberty and Stigmatization in Civil Commitment

The shape that due process takes for involuntary civil commitment is dictated by the standard of proof required. The loss of liberty cannot be ques-

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[70] *Id.* at 363.

[71] Any number of lower federal courts have been careful to point out the lasting and devastating stigmatization caused by involuntary psychiatric hospitalization. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972).

[72] 387 U.S. 1 (1966).

[73] 397 U.S. 358 (1970).

[74] 397 U.S. 358, 365-66 (1970).

[75] *In re* Gault, 387 U.S. 1, 36 (1966).

[76] *Gault*, 387 U.S. 1 (1966).

[77] *Winship*, 397 U.S. at 363.

tioned and has been described as significant by numerous federal courts[78], including the Supreme Court.[79] The stigmatization of those legally labeled mentally ill is no less, and could be conceivably greater, than that suffered by one adjudicated delinquent or convicted as a criminal. The Supreme Court pronounced that the loss of liberty produced by involuntary commitment is *more* than a loss of freedom from confinement.[80] Such commentary was in consideration of the requisite due process owed, when transferring a criminal prisoner to a psychiatric facility.[81] In a certain sense, the deprivation of liberty, i.e., the additional stigma *beyond* criminal incarceration, was seen as greater when psychiatric hospitalization was imposed. Only a year prior, in the aforementioned landmark case of *Addington v. Texas*,[82] involving the transfer of a criminal to a secure psychiatric facility, the Court reasoned that stigma was an incident of such commitment that "can engender adverse social consequences to the individual . . . we recognize that it can occur and that it can have a very significant impact on the individual."[83]

"Significant impact" may be somewhat inadequate when one considers the negative repercussions of civil commitment vis-a-vis one's familial, social, and employment relationships. It has been noted that the label "mentally ill" endures far beyond the actual hospitalization.[84] Family and friends have been observed to begin to treat someone who is "mentally ill" in an abnormal manner, and to assume that all persons found mentally ill, act similarly "crazy" and

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[78]Though the U.S. Supreme Court has spoken in this area and asserted that such deprivation of liberty exists, it is interesting to note those decisions are prefatory to the Supreme Court's action in this area and, given only the partial adoption of the reasoning in many of the lower federal courts by the Supreme Court, the potential directions the Court may take. *See, e.g.*, McKinney v. George, 556 F. Supp. 645 (N.D. Ill. 1985), *aff'd* 726 F.2d 1183 (7th Cir. 1984) (involuntary civil commitment is clear deprivation of liberty). Brown v. Jensen, 572 F. Supp. 193 (D. Col. 1983) (involuntary civil commitment is a serious deprivation of liberty and requires respect of fundamental rights); Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) (in establishing statutory commitment provisions, state must recognize commitment as a significant deprivation of liberty); Bension v. Meredith, 455 F. Supp. 662 (D.D.C. 1978) (curtailment of liberty is very significant in civil commitment); Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977) (involuntary civil commitment constitutes on extraordinary deprivation of liberty); *Bell*, 384 F. Supp. 1085 (civil commitment is a massive curtailment of liberty); Covington v. Harris, 419 F.2d 617 (D.C. C., 1969) (commitment of the mentally ill under any statutory scheme must be narrowly construed because it is a deprivation of liberty).

[79]The Supreme Court's earliest finding in this area came in Humphrey v. Cady, 405 U.S. 504, 509 (1972) (Court recognized involuntary commitment as a "massive curtailment of liberty" requiring judicial scrutiny of purpose and the necessity for commitment). Most recently, in *Addington*, 441 U.S. 418 the Court tempered its impression of the deprivation, holding that civil commitment for any purpose "constitutes a significant deprivation of liberty that requires due process protection." *Id.* at 425.

[80]Vitek v. Jones, 445 U.S. 480 (1980).

[81]*Id.*

[82]441 U.S. 418 (1979).

[83]*Id.* at 426.

[84]Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA L. REV. 379, 389 (1973). *See also Addington*, 441 U.S. 418; *Vitek*, 445 U.S. 480; Dershowitz, *supra* note 13, at 376; Hiday, *supra* note 13, at 1045, Gross v. Pomerleau, 465 F. Supp. 1167 (D. Md. 1979); Rennie v. Klein, 720 F.2d 266, (3d Cir. 1983); Bentham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980), *aff'd in part, vacated in part* 678 F.2d 511 (5th Cir. 1982), *vacated* Ledbetter v. Benham, 463 U.S. 1222 (1983); *on remand* 719 F.2d 772 (5th Cir. 1980) (court found that there were few injuries "more loathsome and *irreparable*" [emphasis added] than unconstitutional commitment to a mental hospital).

out of control.[85]

The individual, personal deprivations suffered when one is involuntarily committed are particularly dramatic. In addition to the abstract legal rights of freedom, privacy, and bodily integrity,[86] the actual inadequate conditions of many facilities and physical abuse of patients are well-documented.[87] The problematic nature of the dangerous conditions within a number of mental hospitals has been detailed in an April 1985 Senate report prepared jointly by the Senate Committee on Labor and Human Resources — Subcommittee on the Handicapped and Senate Committee on Appropriations — Subcommittee on Labor, Health and Human Services, Education and Related Agencies.[88] The Report was compiled by Senate staff who travelled to 12 states and investigated the physical conditions in state mental hospitals.[89] Thirty-one separate facilities were examined.[90]

The Report opens with the statement that in those state hospitals visited by Senate staff, the conditions were generally the same — deplorable.[91] Physical abuse and serious injury were commonplace.[92] Senate staff uncovered incidents of hospital staff kicking or beating patients, sexual abuse, including rape involving staff and residents, verbal assaults and general intimidation.[93]

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[85] *See* Rosenhan, *supra* note 84. *See also* Dershowitz, *supra* note 13. It is to be noted that though the mentally ill are generally assumed to be uniformly hypersensitive, unpredictable, and potentially dangerous, studies have shown at least in regard to observed dangerousness, that the incidence of violence among the mentally ill seems to be no greater than that of the general population. *Mentally Ill No Higher Crime Risk: Study,* Chicago Daily L. Bull., vol. 131, no. 132, p. 3, col. 2 (1985). The study was funded by the National Institute of Mental Health and the U.S. Dept. of Justice.

In an earlier study, also under the auspices of the National Instititue of Mental Health, research with certain prison populations showed that prisoners had no higher rates of serious mental illness than the general population. Conversely, patients who were mentally ill showed no greater propensity for violence than nonmentally ill persons with similar histories of violent behavior. J. MONAHAN, THE CLINICAL PREDICATION OF VIOLENT BEHAVIOR, 77-78 (Ntl. Inst. of Mental Health Monograph 1981). *But see* Werner, et. al., *Psychiatrists' Judgments of Dangerousness in Patients in an Acute Care Unit,* 141 AM. J. OF PSYCH. 263, 265 (1984) (study found that certain hallucinatory disorders were more strongly related to violent behavior).

[86] *See, e.g.,* Hiday, *supra* note 13 at 1045; Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983); *See also* Note, *Protecting Liberty Interests: Developments in Vermont's Mental Health Law as Federal Constitutional Protection Declines,* 9 VT. L. REV. 265, 277 (1984).

[87] *See, e.g.,* Hiday, *supra* note 13 at 1045; there are also two federal lower court decisions that include a great deal of testimony regarding the realistic conditions of many state psychiatric hospitals, Halderman v. Pennhurst State School & Hospital, 446 F. Supp 1295, 1302-11 (E.D. Pa. 1977), *aff'd,* 612 F.2d 84 (3d Cir. 1979) *rev'd, (en banc),* 451 U.S. 1 (1981); and Wyatt v. Stickney, 334 F. Supp. 1341, 1343 (M.D. Ala. 1971), *aff'd in part, rev'd in part sub. nom,* Wyatt v. Aderholt, 503 F.2d 1305, 1310-11 (5th Cir 1974).

[88] *Staff Report on the Institutionalized Mentally Disabled Requested by Senator Lowel P. Weicker, Jr.,* prepared for joint hearings conducted by the Subcommittee on the Handicapped, Committee on Labor and Human Resources and the Subcommittee on the Handicapped, Committee on Labor and Human Resources and the Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Committee on Appropriations, April 1, 1985. (hereinafter referred to as "Senate Report")

[89] *Id.* at p.7.

[90] *Id.*

[91] *Id.* at 2.

[92] *Id.*

[93] *Id.*

Much of the aggressive behavior by staff (excluding sexual offenses) was justified by staff as an important tool in controlling violence and aggression by patients.[94] If such means proved ineffective, more severe methods of control such as restraint and/or seclusion were frequently observed.[95]

The day-to-day living conditions were considered unacceptable by Senate staff. Sleeping arrangements many times consisted of numerous beds, separated by only a few feet, in a large room dormitory-style.[96] It was estimated that at least half these patients had no closet or private storage space.[97] Some extreme cases were discovered where persons were sleeping on bathroom floors, their "regular" sleeping quarters abandoned to the powerful odor of urine and cigarette smoke.[98]

Finally, the theme of violence is reiterated in the Report as "a de facto feature of ward life in many facilities."[99] Both staff-to-patient and patient-to-patient physical abuse existed; in some cases it was even considered commonplace.[100] While the staff were quick to point out that violence is easily attributed to the aggressive nature of the patients, many patient advocates point the finger at the inadequate screening and training of the hospital employees.[101]

It can be seen that by virtue of the numerous rights infringed upon, the failure to respect many basic human needs, and the outright physical and mental abuse and cruelty, the consequences of an improper decision to commit a person to an institution, or to fail to release him, can be of enormous proportion. Yet, the Supreme Court in *Addington*[102] was seemingly not convinced of the possible grave consequences of involuntary commitment, particularly an erroneous commitment.

The Court expounded that proof beyond a reasonable doubt was intended to err in favor of allowing some guilty persons to go free in order to protect the innocent.[103] However, the Court went on to conclude:

> The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and

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[94] *Id.*

[95] *Id.*

[96] *Id.* at 3.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 10.

[100] *Id.*

[101] *Id.*

[102] 441 U.S. 418 (1979).

[103] *Id.* at 428-29.

> in need of treatment is neither wholly at liberty nor free of stigma . . . It cannot be said, therefore, that it is much better for a mentally normal person to 'go free' than for a mentally normal person to be committed.[104]

Explicit in the Court's holding is the need to ensure that those requiring psychiatric treatment do not lose an opportunity for such treatment because of overly stringent procedural protections. Strangely enough though, this concern with reducing barriers to treatment takes on a false air when one considers that the U.S. Supreme Court allows for a reduced standard of proof in involuntary civil commitment but demands no equivalent quid pro quo for the liberty interest relinquished.[105] As previously mentioned, the Court has failed on several occasions to mandate treatment for those institutionalized mentally ill.

It is important to realize that the state can rely upon two sources of authority to properly institutionalize certain mentally ill persons. Those sources are the doctrine of parens patriae and the police power of the state.[106] The basis upon which the state actually exercises its authority is crucial to a proper analysis of the interests involved in the involuntary hospitalization.

Where the doctrine of parens patriae is invoked, state power is exercised in the best interests of the individual.[107] The state is subject to a duty to care for such individual.[108] The rationale employed in civil commitment is that the state *can* intervene to confine the mentally ill but there is a necessary quid pro quo. Under parents patriae, the state by necessary implication undertakes to care for the mentally ill individual with the express goal of returning that person to "normality" and independent status, i.e., to provide *treatment* for the individual. It has never been contended that involuntary confinement per se, absent any punitive purpose, serves to alter and improve behavior. If then, a state's parens patriae power is used in this area, treatment is consistent with the underlying purposes.

Appropriately, a constitutional right for a mental patient to receive treatment has been recognized by some lower federal courts.[109] Though the

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[104] *Id.*

[105] *See supra* note 50.

[106] Note, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-22 (1974). This article also describes the police power of the states as "a plenary power to make laws and regulations for the protection of the public health, safety, welfare, and morals." *Id. See also* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968); *see generally* Jones v. U.S., 103 S. Ct., 3051 (1983); Jackson v. Indiana, 406 U.S. 715 (1972).

[107] *See, e.g.*, Hiday, *supra* note 13 at 1032. The author found that a parens patriae approach resulted in a nonadversarial passive approach by respondent's counsel as opposed to those commitments founded upon the police power of the states. Further, a parens patriae approach was inimicable to a paternalistic, best interests, non-adversarial role by the attorney. *Id.* at 1038.

[108] *See* Note, *supra* note 106.

[109] *See, e.g.*, Nichols v. Laymon, 506 F. Supp. 267 (N.D. Ill. 1980); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

Supreme Court in *Addington*[110] was concerned the Court has yet to recognize an enforceable right to treatment, despite two recent opportunities for such rulings.[111] The most recent case, *Youngberg v. Romeo,*[112] went only so far as to hold that an involuntarily committed person has a constitutional right to safe conditions, freedom from personal restraint, and the minimal training necessary to protect those rights.[113] The Court rejected the finding of the court of appeals that a right to treatment did exist and essentially held that a person involuntarily committed has a right not to get any worse. Such a holding seriously calls into question how significant the concept of treatment really is, as it is used in *Addington.*[114]

Alternatively, when the state relies upon its police power to commit, no right to treatment would seem to come into play. The police powers of the state vis-a-vis civil commitment can permissibly protect an individual and society from such individual's dangerous propensities.[115] However, though commitment statutes have increasingly relied upon this basis of power to authorize commitment,[116] since treatment is unnecessary and outside of the purposes underlying the state police power, the Supreme Court's "treatment" rationale of *Addington* is inapplicable in this context. It is questionable then whether a standard requiring proof that is clear and convincing in order to commit, based upon the police power of the state, would be constitutional under *Addington v. Texas.*[117]

Given both the actual lack of treatment in many institutions[118] and no legal force to make it a reality,[119] the failure to clearly indicate the true basis of an individual's commitment is of crucial significance to ascertain the rights involved. Without treatment under parens patriae or if commitment is pursuant to the state police power, a standard of proof beyond a reasonable doubt must

[110]441 U.S. 418.

[111]*See supra* note 50.

[112]457 U.S. 307 (1982).

[113]*Id.* at 327-28. *See also* Senate Report, *supra* note 88 at 3, staff reported that as a practical matter: "there is little treatment other than medication provided in many state institutions according to staff, patients, and advocates . . . . Medications and mechanical restraints are often the only alternative or backup in direct-care staff attempts to maintain control."

[114]*See supra* note 104.

[115]*See* Note, *supra* note 106.

[116]*See supra* notes 16, 18.

[117]One article emphasized the point that the exercise of the state's police power in involuntary civil commitment makes the only appropriate role for respondents' attorney an adversarial one, that the deprivation of liberty in such a case stands on no different grounds than that faced by a criminal defendant. Engum & Cuneo, *Attorney's Role as Advocate in Civil Commitment Hearings,* J. PSYCH & L. 161, 163 (1981).

Another author states that the parens patriae/police power distinction is significant. He contends that mental health law is hopelessly muddied by the careless mixing of the state authority to commit under their police power and the therapeutic parens patriae interest with the result that it is too difficult to formulate any coherent, guiding public policy and legal guidelines in this area. Wexler, *Inappropriate Patient Confinement and Appropriate State Advocacy,* 45 L. & CONTEMP. PROBS. 193, 202 (1982).

[118]*See* Senate Report, *supra* note 113.

[119]*See supra* note 50.

be observed to satisfy *Addington*. The practical effect of the utter failure in mental health law to scrutinize the bases of state power in commitment proceedings, or those principles required under *Addington*, is that the system has "followed the path of least resistance" to commit persons. The effect has been to blindly follow a parens patriae/best interest approach with the result that the representation by respondent's counsel is frequently paternalistic and ineffective.[120] Coupled with a lesser standard of proof of "clear and convincing," ineffective assistance of counsel, and the consequent failure to protect those rights possessed by respondents, amounts to a simple best interests orientation. Advocacy for the respondent in too many instances is completely usurped by resort to a best interests standard.[121]

The domination of the civil commitment process by the medical profession was widely acknowledged prior to the recognition of numerous due process protections granted in the 1960's.[122] Even with the due process mandates now extant, the commitment process continues to be abandoned to the psychiatric profession because many attorneys must rely upon the psychiatric opinion of the state's experts for the indigent respondent has no impartial expert, and the attorney is not schooled in the intricacies of psychiatric diagnoses and treatment.[123] The general concensus in the area of civil commitment indicates preliminarily a paternalistic, patronizing attitude by respondents' attorney toward respondents' needs,[124] and then nearly complete reliance upon a potentially biased psychiatric expert for the state to determine what are the "best interests" of the respondent.[125]

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[120]In an examination of the role of counsel in civil commitment proceedings, researchers argue that advocacy for respondents in these proceedings was seriously diluted by an attitude of benevolent paternalism on the part of counsel. They found that "most professionals involved in civil commitment become absorbed in the process itself and lose sight of the fact that a person's liberty and dignity are at stake." Bostick, Kirkman & Samuel, *Individual Rights Versus the Therapeutic State: An Advocacy Model for Respondent's Counsel in Civil Commitment*, 13 CAP. U.L. REV. 139, 174 (1983). The authors go on to state that the entire system in civil commitment is founded on notions "of good intentions or best interests." *Id.* at 141. An effective advocate *for* the respondent is needed because conflicts between best interests as perceived by state psychiatrists and the respondent's actual wishes are inevitable. *Id. See also* Hiday, *supra* note 13 at 1028, 1036. (study showed most attorneys preferred paternalistic, best interests standard over an adversarial stance directed toward least restrictive placement, or avoiding confinement). *Id.*

Note that a number of federal courts have specifically stated that competence of the respondent in civil commitment is presumed unless shown to be otherwise. *See, e.g.*, Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *cert. granted*, 451 U.S. 906 (1981); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded* 414 U.S. 473 (1974); Winters v. Miller, 446 F.2d 65 (2d Cir. 1971); *see also* Hiday, *supra* note 13 at 1028; Litwack, *The Role of counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816 (1974).

[121]*See, e.g.*, Hiday, *supra* note 13 at 1029; *See also* Adalman & D. Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, A Polemic, and A Proposal*, 45 MISS. L.J. 43 (1974); Dershowitz, *supra note* 84 at 377; Cohen, *supra* note 61 at 442.

[122]*See, e.g.*, Hiday, *supra* note 13 at 1029; Hiday, *Id.* at 1032; Fitch, *supra* note 13, Perlin & Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 L. & CONTEMP. PROBS. 161, 166 (1982); Bostick, *supra* note 120, at 1515-52.

[123]*Id.*

[124]*See supra* note 20.

[125]*See supra* note 122. The bias possible on the part of the state psychiatrists is a cause of concern in the area of mental health. One author put it thusly; "[P]sychiatrists may be medical professionals, but their role in

The results of this best interests procedure is nearly a farce at times considering that counsel has been appointed for respondents principally to ensure against an improper deprivation of liberty. Numerous studies have chronicled the many facets of effective assistance of counsel that a plethora of attorneys for the respondent in civil commitment fail to, or are unable to, meet. The basic findings of these studies are that state psychiatrists' testimonies go unchallenged, little or no preparation goes into the legal representation, and attorneys rarely even meet their clients before the hearing, if at all. In short, the involuntary civil commitment hearing, intended as a proceeding intended to provide due process, is to often an "empty ritual."[126]

One study of the system for civil commitment in Texas demonstrated attorneys are very young and inexperienced, the attorney ordinarily serves for a day only, very few patients appear at hearings, and attorneys rarely meet clients before hearings.[127] A similar study, again in Texas, produced comparable results.[128] One attorney commented he would represent 40 patients that day.[129] He had contacted none of them, and had received letters from two parties.[130] The attorney commented that "I may get a chance to consult with them before we get under way."[131] Exploration of the commitment process in Arizona revealed additional common problems.[132] Clients were not met prior to hearings.[133] When attorney and client did speak, at the hearing, frequently the client was heavily medicated.[134] Witnesses were rarely cross-examined.[135] The most crucial witnesses, the state psychiatrists, were asked little more than what

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civil commitment is similar to the prosecutor's because they can drop, reduce, or advance charges of mental illness and imminent dangerousness." *See* Hiday supra note 13, at 1042-43. *See also* Cohen, supra note 61, at 433; Rennie v. Klein, 720 F.2d 266, 271 (1983); *Addington*, 441 U.S. at 432. *But see* Youngberg v. Romeo, 457 U.S. 307 (1982) (Court held that judicial deference must be accorded treatment decisions of state psychiatrists absent on abuse of discretion).

[126] In summarizing the findings of studies of the civil commitment process in 6 different states, the author concludes that representation at the proceedings was "woefully inadequate" and that attorneys were ineffective, ill-prepared, and passive. *See* Hiday, *supra* note 13, at 1030.

Observations of 4 state systems and examination of studies involving 3 other state commitment procedures showed respondents' attorneys to be seriously overworked, underpaid, inexperienced, participants in perfunctory hearings, and liable to rely completely upon the testimony of the state psychiatrist. *See* Adalman & Chambers, *supra* note 121, at 46-51.

For a very detailed investigation of the "relatively" progressive commitment procedures in Ohio, see Keilitz & Roach, *A Study of Defense Counsel and the Involuntary Civil Commitment System in Columbus, Ohio*, 13 CAP. U.L. REV. 175 (1983). *See also* Kumasaka & Gupta, *Lawyers and Psychiatrists in the Court: Issues in Civil Commitment*, 32 MD. L. REV. 6 (1972).

[127] *See* Litwack, *supra* note 120, at 822-23.

[128] *See* Cohen, *supra* note 61, at 429.

[129] *Id.* at 428.

[130] *Id.*

[131] *Id.*

[132] Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1 (1971).

[133] *Id.* at 32-35.

[134] *Id.*

[135] *Id.*

their conclusions and recommendations for the patient were.[136] Lack of funds for "effective" representation proved to create several problems, among them serving to discourage investigation of facts, preparation of the client's defense, exploration of possible treatment alternatives, and retention of independent psychiatric opinion.[137]

The participation in the hearings by a neutral fact finder does not appear to obviate the need for improved preparation and participation by and on behalf of the respondent's attorney. The information available indicates that much as respondents' counsel,[138] the judiciary is left to basing their decision on the only available, informed, expert opinion — the state psychiatrists. In fact, one study found a stronger correlation between paternalistic attitudes and the judiciary, than found with respondents' counsel.[139] However, the judges, while disapproving of an adversarial model for counsel in civil commitment proceedings, resolved that respondents' attorney should sent "both sides" so the court can make an informed decision.[140] A different study concluded that psychiatrists seemed to usurp judicial authority and that judges were unduly deferential.[141]

Though all too often counsel is "ineffective" in its representation in civil commitment, "effective" counsel lacks any real definition.[142] Promoting the interests of one's client presents special difficulties in mental health law, as set forth above. It is not at all clear what the best interests of a particular patient are. What is clear is that the process to determine those best interests should fairly and adequately ascertain the respondent's true condition, to the extent possible, consistent with the strictures of due process when loss of liberty is possible.

Our Supreme Court has attempted a definition of effective due process and advocacy by stating that "the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an *active advocate* [emphasis added] in behalf of his client, as opposed to that of amicus curiae . . ."[143] The Court has held that due process is "effective assistance of counsel."[144] When a person's liberty is at stake, decisions must be made openly, with "full exploration of all the issues."[145] From respondents' at-

[136] *Id.* at 54.

[137] *Id.* at 55.

[138] *See supra* note 122.

[139] *See* Hiday, *supra* note 13, at 1045.

[140] *Id.* at 1037.

[141] *See* Miller & Fiddleman, *supra* note 1, at 406.

[142] *See, e.g.,* Miller & Fiddleman, *supra* note 1 at 408 (basic assumptions underlying our civil and criminal justice systems are subject to 14th amendment protection and where loss of liberty possible effective assistance of counsel is very important).

[143] Anders v. California, 386 U.S. 739 (1967).

[144] McMann v. Richardson, 397 U.S. 759 (1970.

[145] *See* Cohen, *supra* note 61, at 425.

torneys themselves comes the explicit recognition that the role of the attorney in commitment hearings ought to be to raise all relevant evidence bearing upon the condition of the respondent, to present fully both sides to the court.[146] Finally, one study squarely places responsibility for the observation of due process with respondent's attorney.[147]

> A state's mental health system may not always act in what a person would consider his or her best interests. Recognition of the risks and harms that may come to a person when brought into that system has engendered a greater degree of legal review of mental health practices. The nature, conduct, and consequence of this review of involuntary civil commitment proceedings depends largely on the performance of the attorney representing the person who faces possible involuntary hospitalization.[148]

The Constitutional Right of an Indigent Defendant to an Independent Psychiatric Expert

In its ruling in *Ake v. Oklahoma,*[149] the U.S. Supreme Court found a necessary incident of due process for criminal defendants to be access to an impartial psychiatrist when the defendant's sanity at the time of the offense is a significant issue.[150] This holding does not entitle the defendant to choose a psychiatrist, but rather establishes that the State must minimally give a defendant access to a competent, neutral psychiatrist.[151]

It is this author's contention that the reasoning in *Ake* regarding an adequate defense when a defendant's sanity is at issue should become a staple of the civil law of commitment where the *sole* question before the court is the respondent's sanity. The previous arguments in this article have been an attempt to show the necessity for a real due process, one that realistically pro-

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[146] *See* Hiday, *supra* note 13 at 1037.

[147] *See* Keilitz & Roach, *supra* note 126.

[148] *Id.* at 193.

[149] 105 S. Ct. 1087 (1985).

[150] *Id.* at 1096.

[151] *Id.* This notion is consistent with a recent article citing the need for independent psychiatric assistance for indigent defendants. Note, *An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert.* U. ILL. L. REV. 481, (1984). The article advocated for an "impartial, competent, and accessible" standard that had already been recognized in many lower courts and based upon a federal statute, 18 U.S.C. Sec. 3006 A (e) (1976) ("Upon finding . . . that the [expert or investigative] services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.")

For federal cases recognizing the right to a "neutral" psychiatric expert, prior to *Ake*, see, e.g., U.S. v. Fessel 531 F.2d 1275 (5th Cir. 1976) (private psychiatric assistance is required whenever such services are necessary to prepare and present an adequate defense); U.S. v. Fratus, 530 F.2d 644 (5th Cir. 1976), *cert. denied* 429 U.S. 846 (1976) (expert appointed to assess defendant's competency [is] supposed to function as objective, nonpartisan expert); U.S. v. Lincoln, 542 F.2d 746 (8th Cir. 1976), *cert. denied,* 439 U.S. 1106 (upon a reasonable showing of need a psychiatrist should be provided); U.S. v. Chavis, 476 F.2d 1137 (D.C. Cir. 1973), *on reh'g* 486 F.2d 1290 (D.C. Cir. 1973) (expert psychiatric assistance must be commensurate with assistance needed to prepare adequate defense); U.S. v. Wilson, 471 F.2d 1072 (1972) *cert. denied* 410 U.S. 957 (1973) (court's appointment of experts to investigate defendant's competency did not obviate defendant's right to an independent psychiatrist.)

tects the interests of the respondent as they are protected in the criminal and juvenile realms. As *Ake* underlines, where sanity can be key to the determination of criminal culpability, an adequate defense must minimally include the assistance of a neutral psychiatrist.[152]

The Court in *Ake* explained the function of the psychiatrist to be that of a skilled investigator. Psychiatrists are most aware of the relevant sources of information and are trained at drawing plausible conclusions from this information about the nature, severity and effects of the defendant's condition.[153] More significantly, in the truth-seeking forum of a court of law, the psychiatrist is sensitive to those questions to be directed to the opposition's experts and how to interpret their answers.[154] The Court refers to the unique abilities of the psychiatrist to identify the "elusive and often deceptive symptoms of insanity." It is through this "process of investigation, interpretation, and testimony [that] psychiatrists ideally assist . . . to make sensible and educated determinations about the mental condition of the defendant. . . ."[155]

To fully prepare, therefore, in the investigation of sanity in a civil commitment context, counsel must conduct a thorough investigation of allegations in the petition and physician's report. The need for a psychiatrist who is not connected with the state becomes apparent. Given the pro forma nature of many commitment hearings previously mentioned,[156] the possible biases of the state,[157] and the utter fallibility of the psychiatrist making the diagnosis,[158] an

[152] 105 S. Ct. 1096-97 (1985).

[153] *Id.* at 1095.

[154] *Id.*

[155] *Id.* at 1096.

[156] *See supra* note 120.

[157] *See supra* note 125. The possible state biases in civil commitment are noted by several authors observing different state commitment processes. The finding of one study indicate that there can be a significantly different orientation for an independent psychiatrist that are affiliated with a state hospital. Those state psychiatrists potentially face ethical problems in testifying "against" this patient, the testimony may create treatment problems if the hospital is treating that patient, and state professionals may stand to profit by admitting certain patients or in retaining them for continuation of certain research work. *See* Perlin & Sadoff, *supra* note 122, at 184-85.

The inadequacy felt by attorneys in challenging the "expert" judgments and findings of the state psychiatrist, and practical inability to question a psychiatric expert without the assistance of another psychiatrist, seek to magnify the possible damaging effect of state testimony that goes unchallenged. *See* Litwack, *supra* note 120, at 830.

Finally, one author concludes that the provision of counsel is absolutely meaningless in civil commitment proceedings unless there is an active circumspecting of the *allegations* of the state psychiatrists; and that a neutral psychiatrist's ability to capably address psychological issues and findings would probably serve to push state psychiatrists to do a more thorough and exacting job when examining a respondent. *See* Hiday, *supra* note 13, at 1047.

[158] The literature in this area abounds with questions regarding the real degree of certainty that can be achieved in positing psychiatric diagnoses of the "mentally ill." The U.S. Supreme Court seems to entertain no doubts about the fact that such testimony is speculative and unreliable. See *Ake*, 105 S. Ct. at 1096, ("psychiatry is not . . . an exact science and psychiatrists disagree widely and frequently on what constitutes mental illness. . ."). *Addington*, 441 U.S. at 429 ("Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous); *O'Connor*, 422 U.S. at 584 (concurring opinion, Burger, C.J.) ("there can be little responsible debate regarding the uncertainty of diagnosis in this field and the tentativeness of

independent expert assumes a most significant role. These are subjective judgments requiring more than the self-assured conclusions of a state psychiatrist. Certainly, the state psychiatrist cannot be expected to doubt his own diagnoses and search for their flaws.

The *Ake* Court itself points out that psychiatric predictions are highly unreliable.[159] Many studies and court decisions bear this out, both in diagnosing present psychological states[160] and particularly in assessing potential for future dangerousness.[161]

Owing to the serious ambivalence among experts and the courts regarding the reliability of diagnosis and the need for careful, sophisticated psychiatric analysis of when sanity is a key issue, the *Ake* Court concluded emphatically that:

> The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's witness, the risk of an inaccurate reduction of sanity issues is very high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.[162]

Recognition of the value and applicability of this reasoning to the civil commitment process stems partly from state statutory enactments to provide for such a right[163] and quite clearly from this simple logic of the *Ake* Court. In fact, one

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professional judgment.")

Studies of the reliability of psychiatric diagnosis generally confirm these holdings of the Court. In a well-known experiment, eight sane persons secretly gained admission to 12 separate mental hospitals. After getting inside, all these "actors" ceased to feign mental illness. None of the 8 were discovered by the hospital professionals. Rosenhan, *One Being Sane in Insane Places*, 13 SANTA CLARA L. REV. 379 (1973).

Another study found an accuracy rate in psychiatric diagnosis in no more than one out of three diagnoses over a period of several years. *See* Monahan, *supra* note 85, at 47-49.

Monahan's findings found greater accuracy than an earlier study which found psychiatrists able to predict violence in 25% of cases. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 595 (1978).

[159] *Ake*, 105 S. Ct. at 1096.

[160] *See supra* note 158.

[161] The prediction of dangerousness seems to create even greater diagnostic problems for psychiatrists than the diagnosis of currently existing mental illness. *See, e.g.*, Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 126 (1984); Perlin & Sadoff, *supra* note 122, at 182, ("Many researchers have concluded that psychiatrists are poor predictors of dangerousness."); *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCH. 1099, 1110 (1978) (validity of psychological predictions of violent behavior . . . is extremely poor . . . so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments.")

Some authors argue that such testimony, when it could result in a deprivation of liberty, should simply not be allowed. *See, e.g.*, Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 451-52 (1974); Morse, *supra* note 158, at 600-604.

[162] *Ake*, 105 S. Ct. at 1096.

[163] Some states have provided for an independent psychiatric expert by statute for the indigent. *See, e.g.*, ILL. REV. STAT. ch. 91 1/2, sec. 3-804; OHIO REV. CODE ANN., § 5122.05 (1981).

must appreciate that the involuntary civil commitment in some ways cries out more loudly for the assistance of an independent psychiatrist. Involuntary civil commitment increasingly requires not only a determination of sanity in a proceeding seriously lacking due process protections, but psychiatric testimony regarding the least restrictive and most appropriate placement for the respondent.[164] Add to this the basic fact that the mentally ill are being deprived of their liberty without having committed dangerous acts the equivalent of their criminal "counterparts."

An independent psychiatric expert could ameliorate the impact of a number of these concerns. Rather than an additional procedural right, such assistance is in reality the beginning of the vitality of a true right to counsel — effective, informed, active counsel.[165]

CONCLUSION

It is interesting in our jurisprudence that courts choose, at varying points in time, to "recognize" rights incidental to due process, the logic being that the right has always been necessary to due process. Our courts struggle with the difficult reasoning involved in balancing the interests that provide substance to constitutional rights. The right to an independent psychiatric examination in involuntary civil commitment proceedings is presently such a "dormant" right.

Hopefully, the right will take hold in certain isolated states and the force of the logic will grow in magnitude. Unlike the criminal law, mental health law does not enjoy a prominent, showcase status. Neither are the mentally ill, unfortunately, frequently by the very nature of their condition, effective advocates for change in the commitment system. This article has shown that for a variety of reasons, the risk of error in these mental health decisions is substantial. The process is subjective and paternalistic, with no formulas to guide, no elements of the offense to be proved. The neutral psychiatrist would have no interest in the outcome of the commitment proceeding. His involvement more certainly would ensure the availability of the most pertinent data and records at the hearing and a greater degree of objectivity becomes possible. Most significantly, the respondent may likely experience the sense that this is an attempt at fairness. With no connection to the hospital, and open disclosure of his function in the process, the potential damage of a paternalistic approach is minimized. Improper hospitalization is not a mere mistake, it is an unconstitutional infringement of individual rights. In a prophetic dissenting opinion in *Olmstead v. United States,* the eminent Justice Brandeis warned, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient."[166]

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[164]Support for such a constitutional right comes from both state and federal sources. *See supra* note 22.

[165]*See* Hiday, supra note 13, at 1047; Keilitz & Roach, *supra* note 126, at 186, n. 34.

[166]277 U.S. 438, 479 (1928).